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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 795

BANKERS TRUST COMPANY, as Trustee, *et al.*,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CASES CITED

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Statement

The petitioners pray for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit entered on November 5, 1945 (R. 128), which decree affirmed an order, dated April 25, 1945, made by the United States District Court for the Southern District of New York. (R. 6.)

Pursuant to the District Court order and the opinion of the Circuit Court of Appeals it was determined that the State of New York, (hereinafter called the State), had a valid lien against the real property of the New York, Ontario and Western Railway Co., Debtor, (hereinafter called the Debtor), for the amounts due on past due installments under the Grade Crossing Elimination Act and that the

lien of the State of New York for the aforesaid moneys was prior to the lien of the mortgage bondholders. (R. 122, *et seq.*).

Many of the matters involved in this petition were previously before this Court.

> *Lyford* v. *State of New York,* 140 F. 2d 840, certiorari denied, *sub nom.*
> *Bankers Trust Co.* v. *People of the State of New York,* 323 U. S. 714.

The Circuit Court of Appeals on the prior appeal had held that the moneys due from the Debtor for its share of the cost of grade crossing eliminations were in the nature of a tax and that the State had a valid lien therefor on the real property of the Debtor.

On that appeal both the District Court and the Circuit Court of Appeals reserved for future determination the question of the priority of the State's lien over pre-existing mortgages of the Debtor. (R. 102.) The State then moved in the District Court to conform the proceedings therein with the decision of the Circuit Court of Appeals, and for a further order directing the Trustees to pay the past due installments under the Grade Crossing Elimination Act and upon their failure to do so to assess and apportion its lien. The District Court denied the State's motion to direct the Trustees to pay upon the ground that the financial condition of the Debtor would not permit it at this time, but did permit the State to assess and apportion its lien for unpaid installments and held further that the State's lien should be prior to the lien of the pre-existing mortgages. This decision was affirmed by the Circuit Court of Appeals. (R. 121.) It is from this decision that the petitioners seek the writ of certiorari.

Facts

1. The Debtor operates a railroad extending from Weehawken, New Jersey to Oswego, New York. The portion of the Debtor's railroad within the State of New York was operated under a franchise from the Legislature of the State of New York. (R. 102.)

2. By authority of a 1925 amendment to the Constitution of the State of New York, (Art. VII, Section 14), which amendment was adopted by the State of New York at a general election held after the proposed amendment had been duly advertised pursuant to Section 80 of the New York Election Laws, (R. 123), the Legislature adopted what is known as the Grade Crossing Elimination Act. (Laws of 1926, Chapter 233, superseded by Laws of 1928, Chapter 678; McKinney's Unconsolidated Laws, Sections 7901-12.) Pursuant thereto the Debtor in common with other railroads was required to eliminate certain grade crossing and to pay fifty percent of the cost of the eliminations. (Unconsolidated Laws, Section 7903.)

The Act further provided that if the railroad so elected the State would pay the railroad's share of the cost of the elimination in the first instance and the railroad would then be obliged to pay its share of the cost in installments and upon the default of payment of any installments the State would have a first and paramount lien for the amount of the default against the real property of the railroad located in the County wherein the grade crossing elimination had been performed. (Unconsolidated Laws, Section 7904, Sub. 1, 2, 3.)

3. The orders requiring the grade crossing elimination were made by the Public Service Commission after due compliance with all of the statutory requirements of the Grade

Crossing Elimination Act. Pursuant to the provisions of Subdivision 2 of Section 2, (Section 7902 Unconsolidated Laws), the Department of Public Works filed a list of the crossings, the elimination of which it suggested, to be considered by the Public Service Commission during the following year, and the estimated cost thereof. The Public Service Commission, on due notice to the Department of Public Works, the counties and the railroad corporations, then held public hearings to determine what crossings were to be included in its program of eliminations to be considered by the Commission during the ensuing year. In all instances involved in this appeal the Debtor appeared at such public hearings and elected in writing to avail itself of State funds for its share of the cost of the elimination. (R. 88.)

Thereafter, pursuant to the provisions of Subdivision 5 of Section 2, (Unconsolidated Laws 7902), before ordering any particular elimination on the foregoing program the Public Service Commission held public hearings to determine whether the public welfare required the elimination of the crossing. Notice of these hearings was given to the Debtor by mail and to all other persons who might have an interest in the proceeding by advertisements in daily newspapers published in the County wherein the eliminations were to be performed. (R. 88, 90.) The debtor appeared and was represented at all such public hearings.

4. In a number of instances appeals were taken by the Debtor from the foregoing orders of the Public Service Commission, which appeals were taken pursuant to the provisions of Section 10 of the Grade Crossing Elimination Act, (Section 7910 Unconsolidated Laws), which section granted to any person aggrieved by the order of the Commission

the right to appeal to the Appellate Division and the Court of Appeals of the State of New York.

(Matter of New York, Ontario & Western Ry. Co., 244 App. Div. 664, aff'd, 271 N. Y. 567).

The Opinions Below

This case involves two primary questions, the first as to whether the elimination of grade crossings is a valid use of the police power of the State, and second as to whether the Grade Crossing Elimination Act makes proper provision for notice to interested persons.

The first question was not raised in the District Court, but in respect to the question of notice the District Court held that the provisions of the statute affecting the notice were adequate in that personal service had been given to the Debtor and notice by publication to any other person who might be interested in the proceeding. The District Court further stated that it would seem that the mortgagees were put on notice to examine into proceedings that required an amendment of the State Constitution followed by the appropriation and investment of three million dollars of the State's money (R. 19, 20). The District Court also held that the installments of the Debtor's share of the grade crossing eliminations were payable as taxes and as such were expenses of administration and by reason thereof would have priority over the mortgages. (R. 19.)

The Circuit Court of Appeals on appeal by the petitioners herein held that the Grade Crossing Elimination Act did not impair the obligations of the appellant's mortgage contracts within the constitutional prohibition, as grade crossing eliminations have long been accepted as a valid exercise of the police power. (R. 126.)

In regard to the question of notice the Circuit Court held that notice by publication was clearly adequate notice to the mortgagees, (R. 124), and that in addition thereto the statute itself was also notice to them. (R. 123.)

ARGUMENT

POINT I

Petitioners' mortgage contracts were subject to a valid exercise of the police power of the State.

The principle is firmly established today that all contracts are subject to the police power of the State and when public welfare requires the modification of private contractual obligations in the public interest the rights of the individual must yield to legislation addressed to a legitimate end.

Twentieth Century Associates, Inc. v. *Waldman,* 294 N. Y. 571, App. dismissed, U. S. Supreme Court, January 28, 1946 .... U. S. ....;

Block v. *Hirsch,* 256 U. S. 135;

Marcus Brown Holding Co. v. *Feldman,* 256 U. S. 170;

Manigault v. *Springs,* 199 U. S. 473;

Louisville & Nashville, R. Co. v. *Mottley,* 219 U. S. 467.

This Court has repeatedly held that the elimination of grade crossings is one of the highest uses of the police power.

Erie R. R. Co. v. *Board of Public Utilities Comm.,* 254 U. S. 394;

Denver & Rio Grande R. R. Co. v. *Denver,* 250 U. S. 241;

Missouri K. & T. Rwy. Co. v. *Oklahoma,* 271 U. S. 303;
Missouri Pacific Rwy. Co. v. *Omaha,* 235 U. S. 121;
In re Panhandle Eastern Pipe Line Co., 294 U. S. 613.

Therefore, the contractual rights of the individual are subordinate to the public welfare of the citizens of the State of New York in carrying out the statutory provisions of the Grade Crossing Elimination Act.

POINT II

The State had full power to create a first and paramount lien on the real property of the debtor to secure payment of its indebtedness.

The right of the State to create a lien for the debts due it stems from the prerogative right at common law which gave the British Crown priority over all subjects for payment out of a debtor's property of all debts due it.

The first Constitution of the State of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of England on April 19, 1775, should be and continue the law of the State subject to such alterations as its Legislature might thereafter make. This provision has been embodied in substance in every Constitution of the State since and by virtue thereof the people have succeeded to the Crown's right of priority.

Matter of Carnegie Trust Co., 151 App. Div. 606, aff'd, 206 N. Y. 390;
Marshall v. *State of New York,* 254 U. S. 380.

With the power to create a lien goes likewise the power to create a lien paramount and prior to existing liens.

> *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512.
> *Lyford* v. *State of New York*, 140 F. 2d 840, cert. denied *sub nom. Bankers Trust Co.*, v. *State of New York*, 323 U. S. 714.

The mortgagees were fully aware when their mortgages were placed, that the railroad which they covered was operated under a franchise from the State. (R. 102.) There is no conceivable constitutional basis for holding that a mortgage loan on such a franchise should be given precedence over obligations which the Legislature imposes as a condition of such franchise, for the purpose of protecting the public from dangers created by the operation of railroads.

No clearer expression of Legislative intent to create a first and paramount lien could be found than the language used in Subdivision 3 of Section 4 of the Grade Crossing Elimination Act. (Section 7904, Unconsolidated Laws):

> "Any amount so levied shall thereupon become and be a *first and paramount lien* upon all real property of such railroad corporation or corporations or the successor or successors thereof within such respective towns and cities". (Italics ours.)

The Circuit Court of Appeals in the previous appeal herein has held that the debt was in its nature a tax.

Lyford v. *State of New York, supra.*

So that whether the prior lien is determined to be created as a result of an exercise of the taxing power or of the police power it was not a taking of property without compensation within the meaning of the Constitution.

POINT III

The petitioners received adequate notice of all proceedings for the elimination of the grade crossings involved herein.

The Grade Crossing Elimination Act provided ample opportunity for any interested person to be heard in favor of or in opposition to any proposed elimination, and the statute also afforded a right of appeal from the decisions of the Public Service Commission. (Unconsolidated Laws, Sections 7902, 7910.)

Notice of the public hearings held by the Commission was given by mail to the Debtor and to all other interested persons by publication of the notice of hearings in a daily newspaper published in the counties wherein the contemplated eliminations were located. (R. 89, 90.) These hearings did not take place in a single day, but extended from the period of July 1, 1926 to April 7, 1935. (R. 89, 90.)

The statute itself was notice to the mortgagees and all other interested persons of the procedures thereunder.

> *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 243.

Personal notice of these hearings was not required, as notice by publication has uniformly been held to be adequate.

> *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276;
> *Huling* v. *Kaw Valley Rwy. & Improvement Co.,* 130 U. S. 559;
> *Bragg* v. *Weaver,* 251 U. S. 57;
> *Lamb* v. *Connolly,* 122 N. Y. 531, 25 N. E. 1042;
> *Matter of Depester,* 80 N. Y. 565;
> *People ex rel. Bridgeport Savings Bank* v. *Feitner,* 191 N. Y. 88.

The procedure provided for under the Grade Crossing Elimination Act was neither arbitrary nor unjust. It provided a reasonable opportunity to be heard in protest and also afforded a right of appeal. The statute, accordingly, met all of the tests of due process of law.

Hagar v. *Reclamation District No. 108,* 111 U. S. 701, 708.

Conclusion

We respectfully submit that this cause provides no question warranting review by this Court, and urge that the petition be denied.

Dated: February 21, 1946.

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